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BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

HOWARD DORSEY

Appellants,

v.

ISLAND COUNTY and STATE OF
WASHINGTON, DEPARTMENT OF
ECOLOGY,

Respondents.

SHB No. 89-72

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

HOWARD DORSEY and NORDIC MARINE
FLOATS OF ALASKA, INC.,

Appellants,

v.

ISLAND COUNTY and STATE OF
WASHINGTON, DEPARTMENT OF
ECOLOGY,

Respondents.

SHB No. 90-12

The Shorelines Hearings Board conducted a hearing on these consolidated appeals on September 5-6, 1990, in Mount Vernon, Washington. Present for the Board were: Judith A. Bendor, Chair and presiding; and Members Harold S. Zimmerman, Annette McGee, Nancy Burnett, Gordon F. Crandall and Robert C. Schofield.

Attorneys Keith Dearborn and Christopher Kane represented appellant Howard Dorsey. Appellant Nordic Marine Floats of Alaska,

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
SHB Nos. 89-72 & 90-12

(1)

1 Inc., did not enter an appearance as a party. David Jamieson, Chief
2 Civil Deputy Prosecutor, represented Island County. Allen T. Miller,
3 Jr., Assistant Attorney General, represented the Department of
4 Ecology. Court Reporter Lettie Hylarides with Evergreen Court
5 Reporting (Everett) took the proceedings.

6 Witnesses were sworn and testified. Exhibits were admitted and
7 examined. Argument was made. From the testimony and argument heard
8 and exhibits examined, the Board makes the following:

9 FINDINGS OF FACT

10 I

11 In 1988, Howard Dorsey (Dorsey) engaged Nordic Marine Floats of
12 Alaska, Inc., (Nordic) to construct a floating dock over waters and
13 tidelands of Utsalady Bay, Puget Sound. On about June 9, 1988, the
14 dock was installed adjacent to Dorsey's single-family residence on
15 north Camano Island, at 1230 North Shore Drive, in Island County,
16 Washington. The dock was 100 feet in length and extended from the
17 beach out beyond the line of extreme low tide into the Bay.

18 The cost of the dock, including installation, was about \$16,500.
19 Neither Dorsey nor Nordic applied for a shoreline substantial
20 development permit prior to the dock's installation, nor did either
21 inform the County about the dock. Island County is the agency with
22 initial jurisdiction for such permit.

23 II

24 In April 1989, Island County became aware of the dock, and on
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1 April 19 the Planning Department advised Dorsey that constuction of
2 the dock without prior approval was a violation of the Shoreline
3 Management Act and the Island County Shoreline Master Program. The
4 Planning Director suggested that Dorsey submit a site plan and
5 cross-sectional view of the dock to determine whether the dock was
6 exempt under WAC 173-124-040(h), (construction of a private dock where
7 the cost or fair market value, whichever is higher, does not exceed
8 \$2500).

9 III

10 On July 12, 1989, Dorsey applied for a substantial development
11 permit for the existing dock. On August 1, 1989, the Planning
12 Director issued a declaration of nonsignificance under the State
13 Environmental Policy Act (SEPA). On September 15, 1989, the Planning
14 Director issued his analysis and recommendation, concluding that
15 construction of the dock was contrary to the general intent, purposes,
16 goals and policies of the Island County Shoreline Master Program, and
17 recommending that the permit request be denied and that the dock be
18 removed. The permit was thereafter denied.

19 IV

20 Dorsey appealed the denial to the Island County Hearing Examiner.

21 On November 1, 1990 the County Hearing Examiner issued a written
22 decision affirming the denial of the shoreline substantial development
23 permit, concluding that the existing floating dock impermissibly
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1 interferred with geohydraulic shoreline processes (littoral drift).
2 In all other respects the Examiner found the dock to be acceptable.
3 The denial was without prejudice to the submission of a different dock
4 design which would not interfere with littoral drift. It was
5 possible, the Hearing Examiner stated, that such a design could be
6 approved.

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8 V

9 The Hearing Examiner's decision stated that Dorsey should remove
10 the illegally constructed dock within 30 days of November 1, 1989, and
11 that if it were not so removed, the Planning Director should take
12 appropriate enforcement action. Dorsey did not remove the dock as
13 required by the Hearing Examiner's decision. On December 6, 1989, he
14 appealed the Hearing Examiner's decision to the Shorelines Hearings
15 Board. This became our appeal SHB No. 89-72.

16 VI

17 On January 29, 1990, the Board of County Commissioners and the
18 State Department of Ecology jointly issued a cease and desist order
19 and notice of civil penalty for \$15,000, jointly and severally,
20 ordering Dorsey and Nordic to remove the unauthorized floating dock
21 within fourteen days. Dorsey and Nordic appealed the penalty order to
22 the Shorelines Hearings Board, which became our SHB No. 90-12. This
23 was consolidated with the permit denial appeal, SHB No. 89-72.
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1 Dorsey removed the dock on March 4, 1990, after the County
2 informed him that it would file suit in state court.

3 VII

4 On March 19, 1990, Dorsey submitted an application to the Army
5 Corps of Engineers for a permit to construct a fixed dock at the site,
6 to include a ramp, floats and piling. The Corps had previously
7 informed him, (October 30, 1989 letter) that installing a dock without
8 a Section 10 permit violated the Federal Rivers and Harbor Act.
9 Dorsey did not submit this application to Island County.

10 VIII

11 Appellant Dorsey owns his own business, a lumber mill. He has
12 extensive experience with activities which are subject to regulation.
13 Dorsey testified that it was his belief that no permits were needed
14 for the dock because it was removable. He also felt that only that
15 part of the structure located on state lands would require a permit,
16 and had estimated that this portion of the dock cost less than the
17 \$2,500 threshold required for substantial development permits.
18 Regarding a shoreline permit, he spoke with a friend at the Port of
19 Everett, friends at the Department of Natural Resources and with
20 Roland Halvorson of Nordic, but did not consult with Island County,
21 the Department of Ecology or the Corps of Engineers.

22 Dorsey testified that he refused to remove the dock by December
23 1, 1989, as ordered by the Hearing Examiner, because he felt that an
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1 appeal to the Shorelines Hearings Board would suspend the operation of
2 the order. He said that legal counsel told him that he could leave
3 the dock in place.

4 No legal authority to support these contentions has been supplied
5 to the Board.

6 Overall, we find that Dorsey's efforts to determine whether a
7 permit was required, did not demonstrate good faith or conscientious
8 efforts.

9 IX

10 Nordic's president testified at the hearing. Nordic is in the
11 business of constructing docks in Washington State and elsewhere.
12 Nordic made no effort to determine whether a shoreline permit was
13 required, and relied on their client, Mr. Dorsey, to make the
14 determination.

15 X

16 In this appeal, Dorsey asks the Shorelines Hearings Board to
17 approve a fixed dock in the design submitted to the Corps of
18 Engineers. (Ex. A-18)

19 Dorsey has granted joint-use dock rights to thirteen boaters from
20 outside the immediate area, and testified that neighboring property
21 owners would be offered the same privilege, (i.e., on a personal
22 basis, not a recorded real property interest).

23 XI

24 At the conclusion of appellant Dorsey's case before this Board,
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1 Island County moved for a "directed verdict", that is, to deny the
2 appeal and affirm the County's denial of the permit. SHB No. 89-72.
3 The County argued that Dorsey's proposal at the hearing substantially
4 differed from the dock the County had denied, and that the proper
5 course for Dorsey was to submit a new application to Island County,
6 and not have the matter decided by the Shorelines Hearings Board.

7 After conferring, the Board orally granted the motion.

8 XII

9 We found then, and now affirm here, that the proposed fixed pier
10 constitutes a substantially different project from the floating pier
11 that had been built, placed on site and subsequently reviewed by the
12 County. A fixed pier is elevated; a floating pier moves up and down
13 with the tide and "bottoms out" on the tidelands. The impacts on
14 littoral drift and aesthetics are more likely than not to be
15 significantly different. The fixed pier has also not undergone a
16 County permit application review or a SEPA review.

17 XIII

18 Any Conclusion of Law deemed to be a Finding of Fact is hereby
19 adopted as such. From these Findings of Fact, the Board makes the
20 following:

21 CONCLUSIONS OF LAW

22 I

23 The Board has jurisdiction over the parties and the subject
24 matter of these appeals. RCW 90.58.180 and .210.

1 II

2 The Board reviews a proposal for a substantial development permit
3 for consistency with the Island County Shorelines Master Program (SMP)
4 and the Shoreline Management Act (SMA). Chapt. 90.58 RCW; WAC
5 461-08-175.

6 III

7 The Board reviews a penalty imposed by government, in accordance
8 with RCW 90.58.210 and Chapt. 173-17 WAC. If liability is found, the
9 severity of a shoreline penalty is reviewed based upon several
10 factors, including: 1) the nature and extent of the violation,
11 including any damage or risk to the public or to public resources; 2)
12 the need to promote compliance with the law; 3) whether the persons
13 took steps to mitigate their actions after being informed of
14 illegality and prior to the issuance of a penalty order; and 4)
15 whether there have been prior violations.

16 IV

17 RCW 90.58.180(1) provides that any person aggrieved by the
18 granting, denying, or rescinding of a permit on shorelines of the
19 state pursuant to RCW 90.58.140 may seek review from the Shorelines
20 Hearings Board. The Board makes its decision by considering:

21 (c) . . . whether the action of the local government
22 unit is consistent with the applicable master program and
23 the provisions of chapter 90.58 RCW. WAC 461-08-175.

1 SEPA review at the local level is a required part of the process.

2 Here the County denied a permit for a floating pier, and has
3 never been asked to decide whether a fixed pier would be permitted.
4 This Board cannot usurp the County's authority by ruling in the first
5 instance on Dorsey's proposal for a fixed pier. The Board's authority
6 is limited to a review of the County's action. WAC 461-08-175(c).
7 The proposal presented to the Board is substantially different in
8 scope from the the original floating pier presented to the County.

9 The Board's oral ruling at the hearing, on the County's motion at
10 the end of Dorsey's case, was correct. To do otherwise would
11 impermissibly thwart the local review process, including the SEPA
12 requirements.

13 The Board's oral ruling affirming the County on appeal SHB 89-72,
14 is hereby confirmed.

15 V

16 The maximum penalty is \$1,000 per violation, with each day
17 constituting a separate violation. WAC 173-17-050(1). The \$15,000
18 penalty imposed was less than the maximum.

19 A permit was clearly required and thus liability exists.
20 Further, the Board concludes that penalties should be imposed upon
21 both Dorsey and Nordic. However, as the following will detail, some
22 mitigation of the \$15,000 is appropriate.
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1 Overall, we conclude that a \$1,000 penalty for Nordic, and a
2 \$12,175 penalty for Dorsey (\$3,500 due and \$8,675 suspended for three
3 years) is appropriate. Our reasoning is as follows:

4 Nordic and Dorsey were each equally culpable for installing the
5 dock without a permit and \$1,000 each is proper.

6 After observing Nordic's president's demeanor during testimony,
7 we are convinced that Nordic's \$1,000 penalty is sufficient to serve
8 as a deterrent.

9 Dorsey enjoyed the use of the dock, the the fruit of his unlawful
10 conduct, for almost two years. Dorsey could have removed the dock at
11 any time, with a minimal effort. He refused to do so.

12 We conclude that additionally, as to Dorsey, the penalty of \$25
13 per day as set by the County, is appropriate for the period from
14 installation on June 9, 1988 to April 19, 1989 (314 days), equalling
15 \$8,850. From April 19, 1989 until November 30, 1989 we conclude that
16 the County's statements reasonably gave Dorsey the impression that
17 removal of the dock was not required during the permit application
18 process. Therefore, mitigation of the penalty for this period is
19 appropriate. However, Dorsey proceeded at his own risk not to obey
20 the Hearing Examiner's order to remove the pier by December 1, 1989.
21 Therefore, a penalty from December 1, 1989 until March 4, 1990 (93
22 days) at the same \$25/day, equalling \$2,325, is appropriate. The
23 total Dorsey penalty is, therefore, \$12,175.

1 We further conclude that as to appellant Dorsey, the sum of
2 \$3,500 is due upon the issuance of this decision, and the sum of
3 \$8,675 is suspended on the condition that he does not violate the
4 Washington Shoreline Management Act, any Shoreline Master Program, or
5 any shoreline regulations for a period of three years from the date of
6 this Order. This is Dorsey's first offense, and this should have the
7 appropriate deterrent effect.

8 Nothing herein shall preclude either Nordic or Dorsey from
9 submitting applications for shorelines substantial development permits
10 at this or other locations.

11 VI

12 Any Finding of Fact deemed to be a Conclusion of Law is hereby
13 adopted as such. From these Conclusions of Law, the Board enters this:
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ORDER

The appeal of Howard Dorsey from the denial of a substantial development permit for construction of a floating dock at 1230 North Shore Drive, Camano Island, WA, (SHB No. 89-72), is DISMISSED.

The penalties assessed by Island County to Howard Dorsey and Nordic Marine Floats of Alaska, Inc., are AFFIRMED as to liability, with the \$15,000 penalty MITIGATED to be: \$1,000 due as to Nordic Marine; \$12,125 assessed as to Howard Dorsey, with \$3,500 DUE, and \$8,675 SUSPENDED provided that he complies with the Shoreline Management Act and implementing regulations including local Shoreline Master Programs for three years.

DONE this 30th day of October, 1990.

SHORELINES HEARINGS BOARD

Judith A. Bendor
JUDITH A. BENDOR, Presiding

Harold S. Zimmerman
HAROLD S. ZIMMERMAN, Member

Annette S. McGee
ANNETTE S. MCGEE, Member

Nancy Burnett
NANCY BURNETT, Member

Gordon F. Crandall
GORDON F. CRANDALL, Member

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ROBERT C. SCHOFIELD, Member

INFORMATION ON EXHIBITS

Please notify Ms. Robyn Bryant of this office by
Feb 1, 1991 if you will be arranging to have your oversized
exhibits retrieved.

If you do not notify us, absent an appeal, the exhibits will be
discarded. If the matter is appealed, the exhibits are sent to
Superior Court.